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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MUSTAFA TARIN, Defendant and Appellant.	G040099 (Super. Ct. No. 06WF1121) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed.

Wilson Adam Schooley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

Mustafa Tarin appeals from a judgment after a jury convicted him of forcible rape (Pen. Code, § 261, subd. (a)(2))[1] (count 2) and sodomy by force (§ 286, subd. (c)(2)) (count 3),[2] and the trial court sentenced him to a total term of 12 years in prison. Tarin argues the trial court erroneously admitted evidence, the court erroneously instructed the jury, and insufficient evidence supports his convictions. None of his contentions have merit, and we affirm the judgment.

FACTS

During trial, at the close of the prosecutor's case-in-chief, the parties stipulated that in April 2006, "Tarin was not eliminated as the source of the sperm fraction obtained from [I.R.'s] vaginal swab . . . ." The prosecutor's theory was Tarin and another man kidnapped 14-year-old I.R., took her to a park, and forcibly raped and sodomized her. Defense counsel painted a different picture. Defense counsel conceded Tarin and I.R. had a sexual encounter on or near December 26, 2000, but asserted the encounter was consensual. Because a repeated theme in Tarin's appellate briefs is I.R.'s alleged inconsistent accounts of the evening, we will provide each version, beginning with her statements to officers upon being dropped off near her home.

I.R.'s Police Interview

On December 26, 2000, at approximately 4:00 a.m., Officer Michael Zannitto responded to the Fire Station Motel. Zannitto saw I.R. near the front of the motel; her clothes were dirty, her hair was matted, and she was crying. I.R. told him "she was having pain in her private area both front and back." I.R. was "sleepy" or intoxicated, she smelled of alcohol, and her eyes were bloodshot and watery, but she

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

[2] The jury acquitted Tarin of kidnapping to commit a sex offense (count 1), and found the allegations the movement of I.R. substantially increased the risk of harm to her not to be true as to counts 2 and 3.

denied drinking. After taking I.R. to the police station, Zannitto tried to interview her, but she was falling asleep. Zannitto and his partner decided to reenact the incident to help I.R. remember what happened.

I.R. said "Shorty" and "Crook" picked her up at the Fire Station Motel about 7:00 p.m. on Christmas Day and agreed to take her home, to the Travel Country Trailer Park across the street. She described Shorty as: a "male Hispanic; 17 years [old]; [six] foot [one]; 180 pounds; brown hair; brown eyes; shaved head; light complexion; mustache; small patch of hair on lower lip; wearing a brown Pendleton, baggy; with a white, black baggie pants; white Fila tennis shoes . . .; dark sunglass[es]; two diamond earrings in his left ear; metal belt buckle is an S . . . on it; O.C. . . . tattoo on the back of his arms . . .; . . . right handed; and . . . the right front passenger." She described Crook as: "male Hispanic; 21 years [old]; five-[feet]-eight inches to five-feet-nine inches [tall][;] [¶] . . . [¶] 220 pounds; brown hair; brown eyes; shaved hair on both sides with a bowl-shaped straight hair parted in the middle on the top; light complexion with acne; clean shaven; braces on his teeth; wearing white long-sleeved shirt with a black stripe across the top of the shirt and sleeves; baggie blue jeans with Nike . . . tennis shoes; a silver Rolex . . . on the left wrist; a brown leather belt; . . . right handed; and . . . the driver of both suspect vehicles."

I.R. stated that when Crook drove past the trailer park, she protested, and the car doors locked, and she was told to be quiet. I.R. said they drove around Santa Ana for two or three hours and Crook and Shorty flashed gang signs and yelled "Santa Nita." I.R. said they went to a Motel 6 for Crook to get a jacket and she fell asleep. She stated that when Crook returned one and one-half hours later, I.R. said she was thirsty and they went to a Circle K market. She explained one of the men went inside, walked outside to the back of the car, disappeared for approximately five minutes, and handed her an open can of 7-Up. I.R. said she drank the entire can, but that it tasted funny and her mouth immediately became dry. I.R. explained they drove to Mile Square Park where they sat

and talked for 20 minutes. She said they told her to get on a table and Shorty ripped her underwear the first time he was on top of her and ripped her underwear off and threw it on the ground the second time he was on top of her. I.R. said both Shorty and Crook fondled her breasts and raped her—as one man held her down, the other raped her. I.R. stated the men walked away, she pulled up her pants, and she followed them. I.R. said the next thing she remembered was waking up at the Fire Station Motel in the bed of a truck with a camper with her pants down and Shorty laying next to her; she did not have her underwear or socks. I.R. said she had been stabbed with a fork.

I.R.'s Child Abuse Services Team (CAST) Interview

On December 28, 2000, Officer Roger Flanders took I.R. to the Child Abuse Services Team (CAST) center to be interviewed. Flanders observed the interview and afterwards spoke with I.R. During the interview, I.R. seemed reluctant to discuss the details of the assault, and reversed her earlier descriptions of her attackers. She described one of the men as 21 years old, definitely Hispanic and probably Mexican, six feet to six feet one, shaved head, mustache and goatee, one ear was pierced twice, OC tattooed on the back of his arm, large Pendleton jacket with brown and white squares, blue and white shirt, baggy black pants, white tennis shoes, and a gun in his waistband. She described the other man, the driver, as 17 years old, definitely Hispanic and probably Mexican, fluent Spanish, black pants, long-sleeved white shirt, and Nike tennis shoes.

I.R. said she met Crook[3] and Shorty inside the Fire Station Motel, and agreed to go with them and T.O. to get a "bud pipe," a marijuana pipe, from Shorty's house across the street; T.O. did not end up going. She stated they went to Circle K market and one of the men got her a can of 7-Up. She said they went to Mile Square Park and they talked for approximately one and one-half hours when she got bored and asked for them to take her home and she followed them to the car. She stated the next

[3] During the interview, she referred to Crook as "Bullet."

thing she remembered was waking up in the back of a truck driven by someone other than Shorty or Bullet. When officers finally confronted I.R. with her earlier story about being raped, she said Shorty removed her clothes and raped her. She explained that after she dressed, Bullet took her clothes off and raped her while Shorty acted as a lookout. After she was raped, I.R. said they went to Motel 6 where they all went into room 423 and there were people in the room smoking marijuana. I.R. stated she met a woman on the balcony of the Motel 6 and asked if she could use the telephone to call her mother. I.R. said she spent one-half hour with the woman, but never called her mother, and soon left with the men.

She stated Shorty was carrying a handgun in his waistband. She said that before they dropped her off at the motel, she was kicked on the thigh. She also stated she had been stabbed with a fork on the leg. She said they took her money, underwear, and socks.

After the interview was over, I.R. told Flanders the men spoke fluent Spanish and they were Hispanic and probably Mexican.

I.R.'s March 2006 Interview

Officer Aaron Nelson showed I.R. a photographic lineup that included six photographs. Tarin's photograph was in position number one. I.R. identified the photograph in position number three as the person who looked most familiar to her. Nelson asked her what happened and she mentioned being at Motel 6 in a shower with a group of men who were trying to take her clothes off and passing a cigar around.

Tarin's April 2006 Interviews

Nelson and another officer interviewed Tarin twice on the same day over five years after the incident. An audiotape for the first interview and a videotape of the second interview were played for the jury; transcripts of both interviews were provided to the jury.

During the first interview, Tarin claimed he was a virgin until he was 19 years old (he was nearly four months shy of his 18th birthday at the time of the offense). He stated he never had sex in a park. After Nelson described the details of the incident, Tarin denied any involvement in the offense. He insisted he did not remember being involved in anything that resembled the circumstances Nelson described. Nelson told Tarin his DNA was found in the victim, Tarin continued to insist he did not remember the girl, getting anyone drunk, or having sex in a park. Tarin also stated he had never been to the Fire Station Motel and he did not know anyone named T.O. or girls who went by nicknames. After a long confusing discussion about how many sexual partners Tarin had and how many times he had sex, Nelson apparently showed Tarin a picture of I.R. and asked him if he knew her. Tarin said he did not know her and did not have sex with her. For the remainder of the interview, he continued to deny any involvement in the incident.

One hour later, during the second interview, Nelson stated he had arrested Tarin, and he advised him of his *Miranda*[4] rights. Tarin continued to deny any involvement in the offense.

The Trial

Prosecution Witnesses

At trial, the parties stipulated a blood technician drew I.R.'s blood on December 26, 2000, at approximately 8:35 a.m., and I.R.'s blood-alcohol level was .016 percent. The parties further stipulated I.R.'s blood tested negative for the presence of drugs.

The prosecutor offered the testimony of Ronald Moore, a senior forensic scientist at the Orange County Sheriff Department crime lab. Moore stated he supervised the forensic alcohol section and explained how alcohol consumption affects

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[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

blood-alcohol levels and body function. On cross-examination, Moore testified it was unlikely a person who only drank two ounces of alcohol at 8:00 p.m. would have a blood-alcohol level of .016 at 8:35 a.m., the following day. Moore added he would not expect a strong alcohol odor from that person eight hours later.

The prosecutor offered the testimony of Jeanie Ming, a pediatric nurse practitioner with CAST. Ming testified she performed a sexual assault examination of I.R. on December 26, 2000, at approximately 10:30 a.m. Her examination revealed injuries to her vaginal and anal areas. She stated the injuries were consistent with someone being sexually assaulted and raped. But she also said there were "studies where some abrasions are caused by vigorous sex." On cross-examination, Ming admitted I.R.'s injuries were consistent with multiple sexual partners or "rough sex" within 48 hours of the examination as they were with being raped. Ming's examination did not reveal any stab mark to her thigh.

The prosecutor offered Nelson's testimony. He testified that much of the evidence that was collected in the case was destroyed because of a clerical error.

Finally, the prosecutor offered the testimony of I.R., who was 20 years old at the time of trial. I.R. testified she was living at the trailer park next to the Fire Station Motel in December 2000. I.R. went to the motel to visit her friend, T.O., on Christmas Day. T.O. introduced her to Shorty and Crook or Bullet, and I.R. told them her name. Shorty told I.R. he knew her mother. I.R. got into car with Shorty and Crook, and maybe T.O., but she was not sure. She did not remember why she got into the car, and she became scared when she saw a gun. Shorty, the passenger, had a gun in his waistband, and later Crook "flashed" the gun to Shorty. I.R. could not remember how long they drove around, but she said they went to a nearby convenience store. Crook asked if she wanted a drink, and she requested a 7-Up. At some point, I.R. tried to get out of the car, but the doors were locked, and when she said something, Shorty told her to "shut up." Crook returned with a bottle of 7-Up, and I.R. drank it, it tasted "gassy," and she

immediately felt dizzy, tired, and "way beyond drunk." The next thing she remembered was being at a park and sitting on a bench. I.R. remembered being touched all over without her permission and being naked. Shorty and Crook put their penises inside her vagina. When the prosecutor asked her whether the men touched her anywhere else, she replied, "[her] butt." She said "they put [their penises] in [her] butt." The prosecutor inquired whether both men sodomized her, but she could not remember. I.R. told them to stop the entire time they were attacking her. The next thing I.R. remembered was being in a bathtub, naked with an older man on top of her putting his penis inside her vagina. I.R. got dressed, walked out of the bathroom into a smoky room with five or six guys who appeared to be in their 20s, and sat on the bed. She did not see Shorty or Crook. The next thing she remembered was being in the back of a pickup truck with a camper and Crook or Shorty on top of her putting his penis inside her vagina. Soon after I.R. returned to the Fire Station Motel, the police arrived. I.R. admitted she could have confused the two men and explained she never said anything about being raped in the bathroom because she was embarrassed. When the prosecutor asked her to look at Tarin, I.R. stated she did not recognize him.

On cross-examination, I.R. stated she was Hispanic and spoke Spanish. I.R. stated T.O. introduced her to her two friends, Shorty and Bullet or Crook, but that the person named Shorty never called himself that. I.R. denied drinking any alcohol the night of the incident, and she did not think the 7-Up tasted like alcohol. I.R. did not remember telling the CAST interviewer she met the men inside the motel, telling officers she got into the car with the men to get a "bud pipe," telling the CAST interviewer it was a can, not a bottle, of 7-Up, or telling officers they drove around Santa Ana for two or three hours flashing gang signs and yelling at people. I.R. stated the men were Hispanic, but she was unable to describe their physical features or what they were wearing. Defense counsel then asked I.R. a series of questions concerning the circumstances of the offense and what she told officers and the CAST interview, and I.R. could not remember

much of anything. When defense counsel asked I.R. whether she knew what ejaculation or "cumming" are, she responded, "No." After some questions about whether she had a son, and defense counsel rephrased the question, I.R. admitted she knew what it meant and said she did not know whether either man ejaculated during the attack. I.R. admitted she was convicted of receiving stolen property as a juvenile. On redirect examination, I.R. stated that when T.O. introduced her to a man named Shorty, they were standing next to each other, and the man did not deny his name was Shorty. Again, I.R. did not recognize Tarin as someone she dated or had consensual sex with.

Defense Witnesses

Tarin offered the testimony of his uncle, Abdul Arghandehwal. Arghandehwal testified Tarin was five feet 10 inches tall, weighed 150 to 160 pounds, and was dark skinned. He did not believe Tarin spoke Spanish or had any tattoos.

In addition to the DNA stipulation noted above, the parties stipulated that at the time of the offense and at the time of trial, Tarin was known by the nickname Shorty.

DISCUSSION

I. Hearsay & Adoptive Admission

Tarin argues the trial court erroneously admitted evidence, under the adoptive admission exception to the hearsay rule, one of Tarin's nicknames was Shorty. Additionally, he claims the prosecutor committed misconduct during opening argument when he referenced the name Shorty, and defense counsel was ineffective for failing to object. None of his contentions have merit.

A. Admissibility

"Hearsay, of course, is evidence of an out-of-court statement offered by its proponent to prove what it states. [Citation.] Unless it comes within an exception, it is inadmissible. [Citation.]" (*People v. Alvarez* (1996) 14 Cal.4th 155, 185; Evid. Code, § 1200.)

"Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221; *People v. Lewis* (2008) 43 Cal.4th 415, 498-499.) An adoptive admission requires certain foundational facts: the defendant must understand the nature of the accusatory statement; and its circumstances must permit and normally call for a response. If those foundational facts exist, the accusatory statement is admissible for the purpose of interpreting the defendant's response, and any response by the defendant adopting the statement as true is admissible as an admission. (*People v. Combs* (2004) 34 Cal.4th 821, 843.)

"For the adoptive admission exception to apply, . . . a direct accusation in so many words is not essential." (*People v. Fauber* (1992) 2 Cal.4th 792, 852.) "When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. [Citations.] His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." (*Estate of Neilson* (1962) 57 Cal.2d 733, 746; *People v. Riel* (2000) 22 Cal.4th 1153, 1189.) "To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide. [Citation.]" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1011.)

As with other rulings on the admission of evidence, we will uphold the admission of a statement as an adoptive admission unless the trial court has abused its discretion. (See *People v. Waidla* (2000) 22 Cal.4th 690, 725.) The court did not abuse its discretion here.

At an Evidence Code section 402 hearing, defense counsel objected to the admission of I.R.'s testimony T.O. introduced Tarin to her as Shorty because there was no foundation, it was unduly prejudicial, and it was inadmissible hearsay. After the prosecutor explained he had a field identification card and jail mail attributing to Tarin the nickname Shorty, the prosecutor explained a third party introduced Tarin to I.R. as Shorty, but it was unclear whether Tarin used that name. The trial court explained the admissibility of I.R.'s testimony Tarin's nickname was Shorty turned on whether there was an exception to hearsay rule. The court reasoned that if I.R., her friend, and Tarin were standing near each other, the friend introduced Tarin to I.R. as Shorty, and Tarin did not deny that was his name, "it sounds like it's probably an adoptive admission."

Defense counsel agreed with the trial court's framing of the issue, but counsel asked "there be no mention of the gang expert who will say he had a moniker and he was a member of a gang . . . unless there is a foundation laid, I think [I would] have a hard time banishing that. Even if it is the only statement and I think if they were to be admonished that it would be hard to forget." The trial court explained the jury should not hear evidence of Tarin's gang moniker "unless and until" it determined there was admissible evidence from I.R. or another witness that Tarin directly or tacitly acknowledged his nickname was Shorty. After the prosecutor agreed, the court stated the prosecutor could proceed in the manner he deemed appropriate before exploring the admissibility of the gang expert's testimony. When the prosecutor agreed, the court stated: "I just don't want -- until those dots are connected, I think that [defense counsel] is correct, it should not come out in front of the jury in opening statement." The prosecutor replied, "Of course."

After I.R. testified, the trial court revisited the issue. Defense counsel argued the prosecutor had not laid the proper foundation, and the trial court declared a short recess to further research the issue. When back in session, the trial court painstakingly detailed the legal authority it uncovered and its thought process on the

issue. The court reasoned evidence of Tarin's moniker, Shorty, was admissible as an adoptive admission to the hearsay rule because T.O. introduced Tarin to I.R. as Shorty, and they were in such close proximity that if Shorty was not Tarin's nickname, he would have denied it. As we explain above, Tarin later stipulated his nickname was Shorty at the time of the offense.

Tarin contends the trial court erroneously admitted evidence I.R.'s moniker was Shorty because: (1) the statement was a social introduction that did not accuse him of anything; (2) it is unclear whether the statement was made, whether Tarin heard or understood the statement, how Tarin reacted, and whether the statement called for a reply; (3) Shorty is a common nickname; and (4) I.R.'s description did not match Tarin, he may have been in a cast at the time of the offense, and she could not identify him in a photographic lineup or at trial.[5] As we explain below, the trial court properly admitted evidence Tarin's moniker was Shorty.

I.R. testified both on direct and cross-examination that T.O. introduced her to two men, one of whom she was introduced to as Shorty. On direct examination, she stated, "One of them was definitely Shorty." She explained that when T.O. introduced them to her they were standing "right next to [her][,]" and "they were right there, part of the conversation." I.R. added she was talking to them as T.O. said this is Shorty and she said her name. On cross-examination, I.R. testified she was facing the two men and although she was unsure whether the one man's name was Crook or Bullet, she was sure the other man's name was Shorty because "it's just a name I can't forget . . . ."

Remembering a direct accusation is not essential for application of the adoptive admission exception, a point Tarin concedes, sufficient foundation existed for

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[5] In his reply brief, Tarin asserts the Attorney General did not refute many of these points, and therefore, concedes them to be true. In its respondent's brief, the Attorney General argues the trial court properly admitted evidence of Tarin's nickname pursuant to the adoptive admission exception to the hearsay rule, and thus, implicitly refutes these points or contends them to be unpersuasive.

the trial court to permit the jury to consider testimony T.O. introduced Tarin to I.R. as Shorty, and Tarin's failure to respond to that introduction was an adoptive admission his moniker was Shorty. Based on I.R.'s testimony, the jury could reasonably infer the introduction was made, and because of their proximity to each other, that Tarin heard the introduction. The jury could also reasonably infer such an introduction called for a reply if it was untrue, and Tarin's silence was a tacit admission his moniker was Shorty. (*People v. Zavala* (2008) 168 Cal.App.4th 772, 778-780 (*Zavala*) [trial court properly instructed on adoptive admission when defendant's confederates boasted about committing murder and threatened anyone who talked and defendant neither said anything nor denied anything].) While calling Tarin "Shorty" was not a direct accusation of criminal activity, his silence permitted the jury to infer he and the perpetrator of the crimes shared the same name and were possibly the same individual. Tarin's claim Shorty is a common nickname and I.R.'s description of her attacker and inability to identify him has no bearing on the applicability of the adoptive admission exception to the hearsay rule.

B. Prosecutorial Misconduct and Ineffective Assistance of Counsel

Tarin contends the prosecutor committed misconduct during opening argument when he referenced the nickname Shorty, and, alternatively, defense counsel was ineffective for not objecting to the references. Not so.

"'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial. [Citation.] In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an

admonition would not have cured the harm is the claim of misconduct preserved for review. [Citation.]' [Citation.]" (*People v. Parson* (2008) 44 Cal.4th 332, 359.)

"The function of an opening statement is not only to inform the jury of the expected evidence, but also to prepare the jurors to follow the evidence and more readily discern its materiality, force, and meaning. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 518.) "Unquestionably, the prosecution may in its opening statement refer to evidence which it believes will be produced. [Citation.]" (*People v. Barajas* (1983) 145 Cal.App.3d 804, 809.) But a prosecutor may not use the opening statement as a means of bringing patently inadmissible evidence before the jury. (See *People v. Davenport* (1995) 11 Cal.4th 1171, 1212-1213, overruled on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

During opening argument, after stating "this is the time where we can talk about the evidence that we think is going to be presented at the trial," the prosecutor provided the setting of incident. The prosecutor then stated, "[I.R.] didn't know those men and she still doesn't know those men. She was introduced to them as Shorty and Crook, that's how she knows them. During the course of the evening she got herself in a situation where she went with Shorty and Crook." Later, the prosecutor added, "[I.R. is] going to talk to you about things that happened to her after she went with Shorty and Crook." The prosecutor explained, "Shorty and Crook" took her to the Motel 6 where another man raped her, and later "Shorty" was in the truck with her. The prosecutor said I.R. only knew her attackers as "Shorty" and "Crook" or "Bullet." Defense counsel did not object to any of the prosecutor's references to Shorty, and during his opening argument, he mentioned "Shorty" six times.

After defense counsel argued evidence of Tarin's nickname was inadmissible on various grounds and the prosecutor detailed the evidence establishing the nickname, the trial court reasoned the admissibility of I.R.'s testimony concerning Tarin's nickname hinged on the applicability of a hearsay exception and the court would

conduct a further hearing on that issue. Defense counsel agreed with the trial court's analysis of the issue and stated "it would be my request that there be no mention of the gang expert who will say he had a moniker and he was a member of a gang . . . ." The court agreed, stating the officer's testimony about Tarin's gang moniker would be inadmissible until the prosecutor established the adoptive admission exception to the hearsay rule applied. The court added that after the applicability of the exception was litigated, the prosecutor could ask the court "to determine whether or not the gang expert comes in to give his historic gang moniker . . . ." After the prosecutor agreed, the court stated: "I just don't want -- until those dots are connected, I think that [defense counsel] is correct, *it* should not come out in front of the jury in opening statement." (Italics added.)

Based on a complete reading of the transcript of Evidence Code section 402 hearing, we conclude the prosecutor did not commit misconduct during opening argument when he referenced the nickname Shorty. Arguably, the trial court's statement "it" would not come in could refer to either any mention of Tarin's nickname or evidence of Tarin's gang nickname, a point Tarin concedes. But we read the trial court's comments as prohibiting the prosecutor from mentioning the gang officer's testimony that Tarin's gang moniker was Shorty until the applicability of the adoptive admission exception was litigated. The court did not prohibit the prosecutor from mentioning the nickname until defense counsel objected to the prosecutor mentioning the gang expert during opening argument. The prosecutor did reference the name Shorty several times during opening argument, and as we explain above, a prosecutor may refer to evidence which it believes will be admitted—evidence that was ultimately admitted here. (*People v. Hinton* (2006) 37 Cal.4th 839, 863 [where the admissibility of evidence is an issue and evidence is later admitted, there is no prejudice].)

Because we have concluded the prosecutor did not commit misconduct when he referenced the nickname Shorty, we also conclude defense counsel was not ineffective for failing to object to those references.

II. Jury Instructions

Tarin claims there were two instructional errors. We will address each in turn.

A. CALCRIM No. 357

Tarin claims the trial court erroneously failed to instruct the jury sua sponte with Judicial Council of California Criminal Jury Instructions (2008) CALCRIM No. 357, "Adoptive Admissions." We disagree.

Although the trial court ruled evidence of Tarin's moniker, Shorty, was admissible pursuant to the adoptive admission exception to the hearsay rule, the parties later stipulated that at the time of the incident, Tarin was known by three nicknames, one of which was Shorty. The trial court instructed the jury with CALCRIM No. 222, "Evidence," which stated in relevant part: "During the trial, you were told that the People and defense agreed, or stipulated, to certain facts. This means that they both accept those facts. Because there is no dispute about those facts you must accept them as true."

Because the parties stipulated that at the time of the offense one of Tarin's nicknames was Shorty, the issue of whether that evidence was admissible under the adoptive admission exception to the hearsay rule was not before the jury. To the extent Tarin relies on *Zavala, supra,* 168 Cal.App.4th 772, to support his claim the trial court should have instructed the jury with CALCRIM No. 357, he is mistaken. The stipulation established Tarin's nickname was Shorty as true. Again, because we have concluded the trial court had no sua sponte duty to instruct the jury with CALCRIM No. 357 because of the stipulation, we also conclude defense counsel was not ineffective for failing to request the instruction.

B. CALCRIM No. 359

Tarin argues the trial court erroneously instructed the jury with CALCRIM No. 359, "Corpus Delicti: Independent Evidence of a Charged Crime," over defense counsel's objection. We disagree.

The trial court instructed the jury with CALCRIM No. 358, "Evidence of Defendant's Statements" as follows: "You have heard evidence that the defendant made oral or written statements before the trial. You must decide whether or not the defendant made any of these statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give such statements."

Because the bench notes state that whenever a trial court instructs the jury with CALCRIM No. 358, it must also instruct the jury with CALCRIM No. 359, the court instructed the jury with CALCRIM No. 359 as follows: "The defendant may not be convicted of any crime based on his out-of-court statements alone. You may only rely on the defendant's out-of-court statements to convict him if you conclude that other evidence shows that the charged crime or a lesser included offense was committed. [¶] That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed. [¶] The identity of the person who committed the crime may be proved by the defendant's statements alone. [¶] You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt."[6]

Tarin does not dispute the trial court properly instructed the jury with CALCRIM No. 358, thereby conceding there was evidence he made extrajudicial statements. The bench notes mandate that when the trial court instructs the jury with

[6] Although defense counsel initially objected to this instruction, when the trial court explained its rationale for giving the instruction, defense counsel replied, "Okay."

CALCRIM No. 358, it also instruct the jury with CALCRIM No. 359. Therefore, the trial court properly instructed the jury with CALCRIM Nos. 358 and 359. Finally, the trial court instructed the jury some of the instructions may not apply and to follow only the instructions that do apply (CALCRIM No. 200). "'We presume that jurors understand and follow the court's instructions' [citation]. . . ." (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.)

IV. Sufficiency of Evidence

Tarin contends insufficient evidence supports his convictions for counts 2 and 3 "because its lynchpin was inadmissible hearsay." Not so.

"'"To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt."' [Citations.] '"'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'"' [Citations.] The standard of review is the same when the prosecution relies mainly on circumstantial evidence. [Citation.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 104 (*Valdez*).)

Preliminarily, Tarin seems to concede that there was sufficient evidence to support his convictions for counts 2 and 3 *if* the trial court properly admitted the evidence I.R. identified one of her attackers as Shorty. In his opening brief, Tarin stated, "Without it [the alleged hearsay statement], there was not substantial evidence supporting . . . Tarin's conviction." In his reply brief, Tarin says, "Examination of exactly that evidence [the Attorney General] puts forward confirms that evidence does not by itself—without 'Shorty'—support the rape or sodomy convictions." As we explain above, we conclude the trial court properly admitted evidence I.R. identified one of her attackers as Shorty,

and Tarin apparently concedes there was sufficient evidence to support his convictions based on this evidence.

Assuming Tarin does not concede as much, we conclude there was sufficient evidence for the jury to convict Tarin of counts 2 and 3. Tarin admits the DNA evidence established he had sex with I.R. on or around Christmas Day of 2000. When Nelson showed Tarin a photograph of I.R., he denied knowing her or ever having sex with her, demonstrating he was lying to Nelson and undermining his credibility with the jury. Zannitto testified I.R. told him both Shorty and Crook fondled her breasts and raped her. There was also evidence I.R. told the CAST interviewer Shorty removed her clothes and raped her. At trial, I.R. testified both Shorty and Crook put their penises inside her vagina. Although she testified she could not remember whether both men put their penises inside her butt, she also testified "*they* put [their penises] in [her] butt." (Italics added.)

Ming testified I.R.'s injuries were consistent with multiple sexual partners or "rough sex," but she also testified her injuries were consistent with someone being sexually assaulted and raped. Based on the forensic evidence establishing Tarin and I.R. had sexual relations, Tarin's denial he knew I.R. or had sexual relations with her, Ming's testimony, and I.R.'s statements and testimony, we conclude there was sufficient evidence for the jury to convict Tarin of counts 2 and 3.

Tarin argues insufficient evidence supports his convictions because Ming testified I.R.'s injuries could have been caused by "rough sex" or multiple partners, I.R. lied about being intoxicated, I.R. told at least four different stories about what happened, and I.R. could not identify Tarin as one of her attackers and her descriptions of her attackers were different, and actually exonerated him. Tarin essentially asks us to reweigh the evidence, which we cannot do. (*Valdez, supra,* 32 Cal.4th at p. 104; *People v. Ford* (1981) 30 Cal.3d 209, 215 ["inconsistencies in identification evidence are for the jury to resolve"].)

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.